

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1283

ORIG

To be argued by
Allan M. Pepper

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 77-1283, 77-1289, 77-1365

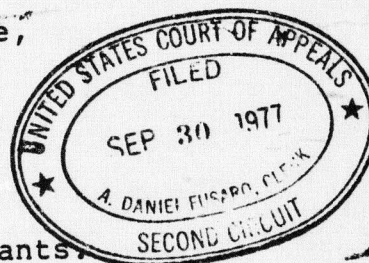
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALBERT DUKE, DONALD NIANG &
ALBERT WILLIAMS,

Defendants-Appellants.



On Appeal From the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANT-APPELLANT ALBERT DUKE

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALBERT DUKE, DONALD NIANG &
ALBERT WILLIAMS,
Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT ALBERT DUKE

Questions Presented

1. Did the trial court commit reversible error when it admitted the declarations of alleged co-conspirators on insufficient independent evidence linking appellant Duke to the conspiracy charged in the indictment?
2. Was the error of variance committed when appellant Duke was convicted on the theory that he participated with all defendants and certain unindicted co-conspirators in a single conspiracy, although the evidence disclosed that if he was involved in

a conspiracy at all, there were multiple conspiracies?

3. Was the admission into evidence of appellant Duke's prior conviction reversible error because it was not probative on any fact relevant to the conviction here; or was its admission at least an abuse of discretion, in view of the failure of the trial judge to remove the prejudice to Duke from the admission of the conviction against its probative value?

4. Did the conviction on the conspiracy count have a "spill-over effect" that substantially prejudiced appellant Duke in his defense to the one substantive count upon which he was convicted?

PRELIMINARY STATEMENT

Defendant Albert Duke appeals from a judgment of conviction entered on December 8, 1976 on two of four counts of an indictment against him, in the United States District Court for the Southern District of New York after a five-day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment S 76 Crim. 916, filed September 24, 1976, charged Duke and co-defendants Albert Williams and Donald Niang in one count with conspiring to steal, transport and sell securities involving interstate commerce, in violation of 18 U.S.C. §§ 656, 2314, and 2315. The indictment also charged Duke, and co-defendants Williams and Niang, with two counts

(counts 3 and 5) of receiving and selling stolen securities valued at more than \$5,000, involving interstate commerce, in violation of 18 U.S.C. §§ 2315 and 2. The indictment further charged Duke, and co-defendants Williams and Niang, with one count (count 4) of transporting in interstate commerce stolen securities valued at more than \$5,000, in violation of 18 U.S.C. §§ 2314, 3237 and 2. Duke was not charged under count two of the indictment.*

Trial commenced on December 2, 1976, and on December 8, 1976 the jury acquitted Duke on counts four and five, and convicted him on count one, the conspiracy count, and three, the substantive count of receiving and selling stolen securities of the Potomac Electric Power Company. Co-defendants Williams and Niang were found guilty on all five counts. On February 24, 1977, Judge Gagliardi sentenced Duke to five years on count one, three years to run concurrently with a prior sentence imposed by Judge Weinfeld, and two years to run consecutively with that sentence; and to seven years on count three, with five to run concurrently with the prior sentence imposed

* This indictment superseded Indictment 76 Crim. 916, which charged Duke, and co-defendants John Doe, a/k/a "Sonny", Robert Doe, a/k/a "Donald", Ted Adams, Pruitt Williams, Jane Doe, a/k/a "Teddy's Sister", Rodney Crosby, August Barbine, Jr., a/k/a "James Johns", a/k/a "Jimmy", and Freddie Pettaway, with various violations of some, or all, of the five counts set forth above. The Government's motion to strike defendants Duke, Albert Williams ("Sonny"), and Donald Niang ("Donald") from that indictment was granted by Judge Gagliardi.

by Judge Weinfeld and with the sentence on count one, and two years to run consecutively.

STATEMENT OF FACTS

A. The Government's Case.

Rodney Franklin Crosby testified that from July 1974 to August 1976 he was employed by the Toledo Trust Company as a "mail clerk". (Tr. 45-46).^{*} In April of 1976 he saw August Barbine, his future brother-in-law, in Atlanta, Georgia. (Tr. 47-48). At this meeting, Crosby mentioned to Barbine that he worked at the Toledo Trust Company. (Tr. 51). Barbine wanted to know if he could obtain some stocks and bonds, and Crosby responded that it was possible to get about \$1 million worth. (Tr. 51-52).

After his return to Toledo, Ohio, Crosby was instructed by Barbine to go to the 600 block on Pinewood, where he met Ted Adams and a man named James. (Tr. 53). In a car, the three men discussed how stocks could be taken. (Tr. 54). On the next day, May 4 or 5, 1976, Crosby took some stock in a manila envelope from the mail room of the Toledo Trust Company and gave it to Ted Adams. (Tr. 55-57). According to Crosby, on the Sunday following the stock theft Barbine wanted to know whether he could get more stock, and on Monday Crosby met Adams and delivered some more stocks to him. (Tr. 58-60).

^{*} "Tr." refers to the trial transcript.

Thereafter, he received a telephone call from Ted Adams' sister, who said she would pick up the stock the next day. (Tr. 61). Crosby took a manila folder with some stock from the bank mail room and gave it to Adams' sister. (Tr. 61-62). Crosby testified that he never got any money from these transactions. (Tr. 64).

On cross-examination, Crosby stated that he never spoke to Albert Duke, and he did not know what happened to the securities after he stole them. (Tr. 64-66).

Ted Adams testified that he first met Barbine in April of 1976, when he was introduced by a mutual friend, Pruitt Williams. (Tr. 86). Williams and Barbine stayed at his home, and in early May they had a conversation about the possibility of getting some stocks and bonds. (Tr. 87). Barbine told him he had a way of getting a package of bonds and coupons worth \$1 million. (Tr. 88). Adams volunteered that he had a friend in New York, one Fred Pettaway, who he believed would be able to find someone to dispose of the bonds. (Tr. 89).

Adams testified that Barbine called Crosby during the first week in May 1976, and that Barbine then told him Crosby was ready to have a package picked up; on the next day, Adams went to a bus stop outside the Toledo Trust Company, and Crosby placed a package in Adams' briefcase. (Tr. 90-92). Adams stated that he and Barbine examined the contents of the package and determined that the bonds were from Reliance Elec-

tric and Houston Oil and worth about seven thousand dollars. (Tr. 93-94).

Adams testified that he contacted his friend, Fred Pettaway, and told him he would like to come to New York with Barbine because he thought he had something of value. (Tr. 95). Around May 10, 1976, according to Adams, Barbine arranged that Crosby deliver another package to him near the bank. (Tr. 97). He went to the same bus stop with a shopping bag, and Crosby dropped securities (about \$135,000 worth) into the bag. (Tr. 97-98). On May 10 or 11, Adams received a call from Fred Pettaway, who told him two or three tickets to New York City would be waiting for him at the airline terminal. (Tr. 99). During that conversation, he also spoke to someone identified as "Donald". (Tr. 100). On May 12, Adams and Barbine flew to Newark Airport (Tr. 101-102), where Adams met Pettaway and defendant Albert Williams, introduced as "Sonny". (Tr. 104-105).

Adams testified that after dropping off Pettaway, the three drove to the St. Nicholas Avenue apartment of defendant Donald Niang. (Tr. 106). Later that day, Niang, "Sonny" Williams, Barbine and he went by car up to Lenox Avenue. (Tr. 109). Adams stated that, leaving Barbine and him in the car, Sonny and Donald went into a certain building for twenty minutes. (Tr. 109). When Sonny and Donald returned, they said, "The dude's not here." (Tr. 109).

When he returned to Toledo on May 18, Adams learned that his sister had picked up more stocks from Crosby. (Tr.

111). On May 19, 1976 Pruitt Williams flew to New York City with these certificates. Upon his return to Toledo, Pruitt Williams expressed disgust at Barbine's lack of action. (Tr. 113-114). On June 8, 1976, according to Adams, Niang called Barbine in Toledo to tell him that he was "working on it." (Tr. 116). Adams testified that a four-way split of the proceeds had been planned, but he never received anything. (Tr. 117).

On cross-examination, Adams testified that he never met or spoke with a man named Duke. (Tr. 120). He also added that Barbine remained in New York City about six weeks with the securities. (Tr. 130).*

August Barbine, Jr. testified that he met Crosby in April of 1976 in Atlanta, Georgia and that Crosby told him he worked in a bank. (Tr. 159). He asked Crosby whether he could get securities, and Crosby responded that he could get close to \$1 million in securities. (Tr. 159). Barbine responded that he was going to make arrangements to get rid of the securities. (Tr. 160).

Upon his return to Toledo, in late April, Barbine stated that he met with Pruitt Williams, who introduced him

* Pruitt Williams also testified that he participated in the scheme, including his participation with Adams in picking up stock, his sending Adams' sister to pick up stock, and his trip to New York with some of the stolen securities. (Tr. 135-147). He also testified on cross-examination that he never spoke with, or conspired with, Albert Duke, an individual he did not know. (Tr. 150).

to Ted Adams, and he told both of them about his plan with Crosby. Barbine offered them a cut to do the leg work, which they accepted. (Tr. 160-161). Adams told Barbine his friend Pettaway in New York would get rid of the securities. (Tr. 161-162).

Thereafter, Barbine testified, he told Crosby that on May 2 or 3 Adams would pick up the securities from him near the bank. (Tr. 162-163). After viewing the stocks Adams had picked up, Barbine called Crosby and told him the package was not what it was supposed to be. (Tr. 163). Nevertheless, on Sunday he arranged with Crosby for Adams to pick up another package on Monday. (Tr. 164). Once again, Adams returned with a bag with an envelope in it. (Tr. 164-165). This time, there were stock certificates from the Potomac Electric Power Company worth one hundred thousand dollars. (Tr. 165).

After the two thefts, Barbine testified, Adams arranged air transportation to Newark for May 11 or 12. (Tr. 165-166). At Newark Airport, Barbine and Adams were met by Fred Pettaway, Albert "Sonny" Williams and a girl. (Tr. 166). This group then proceeded to Niang's apartment. (Tr. 167-168). After viewing the certificates, Niang stated that they were supposed to be bond coupons, but he could still get rid of them. (Tr. 168, 174). They all then went in Niang's car to a building on Lenox Avenue; Niang and Williams went in with a sample of stock and came out about an hour later, stating that their man who handled it was out of town. (Tr. 168-169).

Barbine called Crosby for still another package, and Adams returned to Toledo with a round-trip ticket purchased by Niang. (Tr. 170-172).

Pruitt Williams came to New York with the package containing Reliance Electric Company stock. (Tr. 175). Barbine, according to his testimony, gave the stock to Niang, and never had them in his possession again. (Tr. 176). According to Barbine, Niang said he was going to give the stock to Albert Williams. (Tr. 176). Barbine further testified that Albert Williams then said, "He was going to give them to a guy named 'Duke'." (Tr. 176). (Counsel for Duke objected to this testimony, the first evidence involving Duke in any way. The Court admitted the statement subject to connection.) Barbine admitted that he never met Duke, who was to have sold the securities (Tr. 177), but claimed that he saw Albert Williams talking to Duke in front of Williams' apartment. Barbine never personally spoke to Duke (Tr. 177, 184-185, 201), although he was present five or six times when Niang and Williams met with him. (Tr. 178). Barbine never testified that he heard any of the conversations. Lastly, Barbine stated that he never received any money from the stock scheme. (Tr. 180).

On cross-examination, Barbine stated he never saw securities given to someone called Duke or to the defendant Duke. (Tr. 191). On recross-examination, Barbine added that he did not know whether Duke was a first name or last name and that the reference to "Duke" could have been to anybody.

(Tr. 315-316).

Two officers of the Toledo Trust Company also testified. Robert Black, supervisor of the securities operations department, testified that during the first week of May 1976 the bank had in its possession stock of the Potomac Electric Power Company, which he identified as Government Exhibit 6. (Tr. 330-331). Black also added that in May 1976 the bank had Reliance Electric Engineering Company preferred stock in its possession. (Tr. 319-331). Alan Harris, the bank's supervisor of securities administration, testified that in April 1976 the bank had in its possession 200 shares of Houston Natural Gas Corporation; and that in May of 1976 the bank had Reliance Electric and Engineering Company preferred stock in its possession. (Tr. 350-355).*

The evidence then turned to the contacts made by FBI agents with a man they identified as defendant Duke. John Curran testified that on June 16, 1976 he was assigned "to surveil" John Harris and Albert Duke. (Tr. 365). He stated he was located, at 2:00 p.m., in the branch manager's office

* John Wesley Thomas, an employee of United Airlines, identified a miscellaneous order issued by a travel agency for Albert Williams on May 12, 1976 for \$125 for the transportation of Ted Adams and J. Jones from Toledo to LaGuardia. (Tr. 355-358). He also stated that two tickets were issued in Toledo for transportation to Newark on May 12 on United flight 572 for T. Adams and J. Jones. (Tr. 359-360).

The prosecutor also read into the transcript certain information from telephone company records that detailed calls between certain numbers in New York and Toledo. (Tr. 363-365).

of a bank from which he had a view of Q.D. McGraw's Bar. (Tr. 366). At 2:31 p.m. Albert Duke came out of McGraw's, and he photographed him. (Tr. 367). Agent Curran then added that at 3:20 p.m. Agent Hauss entered McGraw's, and at 3:28 p.m. Duke entered. (Tr. 369). They exited at 3:40 p.m., and 3:52 p.m. respectively. (Tr. 369-371). On cross-examination Agent Curran admitted that on the day he photographed Duke he was seventy to eighty feet away and that the photograph of Duke was not the sharpest he had ever seen, but "was slightly fuzzy." (Tr. 378-380).

Craig Dotlo, another agent, testified that on June 16, 1976 he was assigned to surveil a meeting between Agent John Hauss and Albert Duke at the Q.D. McGraw's Bar. (Tr. 381). Agent Dotlo stated that he saw Agent Hauss and Duke engaged in conversation in a booth located opposite the far end of the bar from 2:15 p.m. to 2:30 p.m., when Duke left. (Tr. 382). He returned to the bar, and Agent Hauss and Duke entered at the same time. (Tr. 383). He saw Duke pass an object to Agent Hauss. (Tr. 383).

John Hauss testified that on June 3, 1976, posing as a John Knapp, a corrupt bank officer, he met Albert Duke at McGraw's Bar at 1:30 p.m., where Duke said he could obtain some stock that was freshly taken. (Tr. 393-394). He stated that on June 15, he had met Duke at the Civil Court Building, and Duke had told him he had people flying in from out-of-town to deliver securities. (Tr. 394). Hauss also testified that

on June 16, between 1:30 p.m. and 2:00 p.m., he met Duke at McGraw's Bar, and Duke said he could obtain for him freshly taken stock valued in excess of \$100,000, and produce it within the hour. (Tr. 395). Within an hour Duke returned and handed him a newspaper package with a paper bag inside; inside the paper bag was a manila folder with securities. (Tr. 395). Agent Hauss indicated Government Exhibit 6 was the stock certificates Duke gave him on June 16 (Potomac Electric Power Company stock). (Tr. 397).*

The Government concluded its case by introducing, over vehement objection, Duke's conviction for violation of the same statutes involved here, 18 U.S.C. §§ 2314 and 2, and conspiracy to do so (18 U.S.C. § 371). (Tr. 430-442).

B. The Defense Cases.

Albert Duke's defense consisted of four alibi witnesses, who placed him far from the scene of McGraw's Bar at the time that the stolen certificates were passed to Agent Hauss;

John Lewis testified that he had been employed at Metropolitan Hospital, located between 97th and 99th Streets, and between 1st and 2nd Avenues, for 31 years. (Tr. 444). On June 16, at about 2:15 or 2:25 p.m., he saw defendant Duke

* Damon Taylor, a special agent of the FBI, testified that he first saw Government Exhibit 6 on June 16 when he received them from Agent Hauss. (Tr. 417). Agent Taylor also testified that he determined that the certificates came from Toledo, Ohio. (Tr. 418).

in the basement of the hospital. (Tr. 444). Lewis indicated he was discussing the Frazier-Foreman fight with Duke and, at 3:25 p.m. on June 16, when he left work, he again saw Duke. (Tr. 446-447).

John Lewis, Jr., who worked in Metropolitan Hospital and had the same mother as Albert Duke, testified that on June 16, 1976 Duke visited the hospital; that date stood out because of the Frazier-Foreman fight of the previous night. (Tr. 453-454). Duke visited him on the elevator at 2:00 p.m. (Tr. 455), and stayed at the job until he got off at 3:35 p.m. At 4:00 p.m. he took Duke to the Mosque Temple on 116th Street and Lenox Avenue. (Tr. 455-456).

Abdul Haqq Taha testified that he knew Albert Duke to be a brother of his in the Nation of Islam. (Tr. 463). Taha further testified that on June 16, at about noon, he learned that a member of the Nation of Islam had been hurt. He picked up a few brothers, including Duke, and went to the Mosque at 116th Street and Lenox Avenue. (Tr. 464-465). Taha stated that they arrived at Metropolitan Hospital at about 2:00 p.m. and checked the emergency room. (Tr. 465-466). He left the hospital at about 3:30 or 4:00 p.m., when Duke also left. (Tr. 467).

Shamsiddin Riza testified that he had known Duke as one of the brothers in a Mosque and that on June 16, 1976 he saw Duke there at about 12:45 p.m. in connection with some

trouble that had occurred. (Tr. 541-542). He also stated that he later saw Duke enter Brother Abdul's car at about 1:30 p.m. (Tr. 542).*

Donald Niang testified in his own defense. He stated that he knew Jimmy Johns, Fred Pettaway, Ted Adams and Pruitt Williams (Tr. 500) and that in the spring of 1976 his brother, defendant Albert Williams, told him Pettaway wanted to talk to them with some man from Toledo interested in setting up a boxing tournament. (Tr. 501-502). Initially, Niang stated, Adams and Johns gave him the impression they wanted to have the tournament, funded by Pepsi Cola and other organizations, but after a while he grew suspicious. (Tr. 503). Lastly, Niang stated that he never discussed or received stock certificates from Johns. (Tr. 505-506). On cross-examination, Niang stated that Barbine lied when he said he went with him and his brother to meet Duke. (Tr. 519).

* Williams' defense consisted of the testimony of Samuel B. Price, executive director of one of the community poverty programs in Central Harlem, who testified that he knew defendant Williams, who worked for Neighborhood Board No. 2 from the spring of 1974 to the present (Tr. 486-488), and Lewis Miller, who testified that he could not identify the person to whom he had sold the ticket to be used from Toledo, Ohio, to New York. (Tr. 495).

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT DUKE'S CONVICTION ON THE CONSPIRACY COUNT. MOST OF THE EVIDENCE AGAINST DUKE CONSISTED OF OUT-OF-COURT STATEMENTS OF ALLEGED CO-CONSPIRATORS, AND THERE WAS INSUFFICIENT INDEPENDENT EVIDENCE TO PERMIT THEIR ADMISSION; IF CONSPIRACY INVOLVING DUKE WAS PROVED, THERE WERE MULTIPLE CONSPIRACIES, NOT THE SINGLE CONSPIRACY WHICH FORMED THE GOVERNMENT'S BASIS FOR INDICTMENT AND TRIAL.

Virtually all the independent testimony about Duke was by FBI agents who testified about his alleged sale of some of the stolen securities. If believed, however -- and it was contradicted by Duke's four alibi witnesses who swore that he was elsewhere when the stolen securities were sold to the FBI agent -- it would only link Duke to the stolen certificates, not to the conspiracy about which the trial revolved. The mastermind behind the plot was Barbine; he and his Ohio group gave direct testimony about the involvement of all of the alleged co-conspirators, down the chain of distribution, until the securities were allegedly turned over to defendants Williams and Niang. There the chain of direct evidence came to an end; it was picked up again only by that testimony of the FBI agents. Because none of the alleged co-conspirators who testified at the trial had any contact down the chain of distribution after Niang and Williams, the Government was unable to supply a direct evidentiary link between Duke and the co-conspirators; the only way to link him to the conspiracy was through the

out-of-court statements of defendants Williams and Niang, his alleged co-conspirators, about which Barbine testified.

Barbine's testimony concerning the statements of other alleged co-conspirators, then, was of critical importance. Its admission worked a gross injustice on Duke. The jury would have viewed the evidence of Duke's alibi witnesses in a wholly different light had it not been for the admission of the extensive testimony of criminal acts by others, and especially that crucial testimony of co-conspirators' declarations linking Duke with the conspiracy. The independent evidence tying Duke to the conspiracy was plainly insufficient to allow the jury to consider those declarations. What is more, the trial testimony showed that this was a case of multiple conspiracies, not the one, overall conspiracy charged in the indictment, and while the testimony of the FBI agents may have shown Duke's connection with some conspiracy, the only evidence even bearing on his connection with the single conspiracy at the base of the Government's theory was the co-conspirators' declarations.

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED THE DECLARATIONS OF CO-CONSPIRATORS ON INSUFFICIENT INDEPENDENT EVIDENCE.

At the trial below, the Court permitted, "subject to connection" (Tr. 176-177, 306-307), a highly prejudicial and damaging series of co-conspirator declarations testified to by Barbine. These declarations formed a large part of the total evidence against Duke, and the only evidence link-

ing him to the conspiracy. Barbine testified that defendant Albert ("Sonny") Williams said, with respect to the securities that, "he was going to give them to a guy named Duke" who was "going to have the names changed on them and have them sold." (Tr. 176-177).^{*} Barbine then added that defendant Williams "always told [him] that he was going to meet Duke." (Tr. 177). Later, on redirect, Barbine testified that defendant Donald Niang told him "that Sonny had called and we were going to meet Duke that evening, see what was happening with the stock." (Tr. 306). Barbine then added, without differentiating between Niang's and Williams' statements, that he was informed that "Duke was having the names changed on [the securities], he was having them switched on one occasion, he wanted them Xeroxed on another occasion." (Tr. 307). Lastly, Barbine testified that, according to Niang, "Duke wanted a contract with somebody." (Tr. 307). This evidence, which was permitted to pollute the impartial minds of the jurors and unfairly undermine Duke's attempts to defend himself, was the only evidence linking him to the conspiracy; its effect on the jury could not have been more prejudicial.

All other evidence at the trial concerning Duke was extremely limited and equivocal on the conspiracy count. There was a small amount of direct evidence by Barbine, which was without probative value. Barbine stated that he saw Niang and

^{*} This statement appears twice in the record because the prosecutor had the witness repeat his answer.

Albert Williams speaking with Duke on five or six occasions. Since he could not testify as to the substance of any of those discussions because he did not hear them, Barbine's independent testimony concerning Duke's alleged involvement was worthless. (Tr. 177-178, 312).

All the other evidence against Duke was supplied by the FBI agents, but they could link Duke only to the stolen certificates, not to the conspiracy and its lurid details, which took up the greater part of the trial. Agents Curran and Dotlo testified that they observed Duke when he attended a meeting with Agent Hauss at Q.D. McGraw's Bar on June 16, 1976. (Tr. 366-370, 381-388). Agent Hauss testified that on June 15, 1976, Duke told him he had people flying in from out-of-town for delivery of securities. (Tr. 394).^{*} Agent Hauss also testified that on June 16, Duke told him he could provide him with freshly taken stock, which Duke valued at more than \$100,000, and that Duke said he would get the stock and return in an hour. (Tr. 395). Agent Hauss concluded his testimony by stating that Duke returned within an hour to the bar and handed him an envelope that contained stock certificates of the Potomac Electric Power Company. (Tr. 395-397).

* This statement does not really bear on Duke's involvement in the conspiracy proved at trial because, if the statement was made, it was either untrue or referred to stocks stolen and transported by persons other than Barbine and his group. The last person "flying in from out-of-town" in this conspiracy was Pruitt Williams, who flew to New York on May 19 (Tr. 113, 145, 184); the alleged statement was made on June 15. (Tr. 394).

Reviewing the testimony, it becomes apparent that, while the testimony of the FBI agents purports to connect Duke to the Potomac Electric Power Company stock certificates, the independent evidence fails to connect Duke, other than by rank speculation, to the particular conspiracy involving Barbine, his Ohio group, Niang and Williams. On the basis of this independent testimony, it is just as likely that Duke, if he was the man at McGraw's, obtained the stock from some other intermediate source. In such circumstances the law does not permit the admission of the co-conspirators' statements, which was the only testimony that could have provided that link.

In United States v. Geaney, 417 F.2d 1116, 1117-1118 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970), this Court addressed itself to the "vexed question of the sufficiency of evidence of conspiracy to warrant the admission of declarations of alleged co-conspirators in furtherance of the conspiracy":

"While the practicalities of a conspiracy trial may require that hearsay be admitted 'subject to connection,' the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility, as could well have been

the case here, declare a mistrial if the defendant asks for it." (Id. at 1120).

Since Geaney, this Court has repeatedly reaffirmed its test of "fair preponderance of the evidence independent of hearsay utterances." See, e.g., United States v. Stanchich, 550 F.2d 1294, 1297-1299 (2d Cir. 1977); United States v. Lam Lek Chong, 544 F.2d 58, 64 (2d Cir. 1976); United States v. Joyce, 542 F.2d 158, 161, n.10 (2d Cir. 1976), cert. denied, 45 U.S.L.W. No. 75-1444 (Oct. 4, 1976); United States v. Doulin, 538 F.2d 466, 471 (2d Cir. 1976), cert. denied, 97 S.Ct. 256 (1976); United States v. Glazer, 532 F.2d 224, 228-229 (2d Cir. 1976). ("We have repeatedly reaffirmed the Geaney formulation of a 'fair preponderance' of non-hearsay evidence as the quantum which must be established before the hearsay declarations of associates in the illicit venture may be admitted against the defendant.")

The recent enactment of Rule 801(d)(2)(E) of the Federal Rules of Evidence, stating that a declaration of a co-conspirator is not hearsay, does not alter the trial court's duty to make such a preliminary determination (See Fed.R.Ev. 104). See United States v. Graham, 548 F.2d 1302, 1308 (8th Cir. 1977); (statements by a co-conspirator made in furtherance of the conspiracy are not hearsay and are admissible against all co-conspirators if the Government's independent proof at trial shows the likelihood of an illicit association between the declarant and the defendant); United States v. Papia, Nos. 76-1420-22, 1499 (7th Cir., filed Aug. 19, 1977);

United States v. Dixon, No. 76-2446 (9th Cir., filed July 13, 1977) (under Rule 801(d)(2)(E) the "relevant prerequisites to admission of a [co-conspirator's] statement are embodied in the word 'conspirator': the government must show by evidence independent of the statement (1) that a conspiracy existed and (2) that [the defendant] was a member of it"); United States v. Peterson, Nos. 76-1438 and 1449 (9th Cir., filed March 3, 1977); United States v. Frol, 518 F.2d 1134, 1136 (8th Cir. 1975); United States v. Hassell, 547 F.2d 1048, 1052-1053 (8th Cir. 1977), cert. denied, 97 S. Ct. 1338 (1977); United States v. Williams, 529 F.2d 557, 559 (8th Cir. 1976), cert. denied, 96 S.Ct. 2232 (1976); see, gen. 4 Weinstein Evidence, ¶ 801(d)(2)(E)[01]. Otherwise, the declaration of a co-conspirator would, as the Supreme Court stated in Glasser v. United States, 315 U.S. 60, 74-75 (1942), "lift itself by its own bootstraps to the level of competent evidence."*

A comparison of pertinent cases which have allowed and rejected co-conspirator statements demonstrates that the independent evidence here was plainly insufficient. United States v. Fantuzzi, 463 F.2d 683 (2d Cir. 1972) is closest in point. In Fantuzzi, as here, circumstantial evidence of

* The record does not show that the trial judge made the determination required by Geaney. While in the past this Court has assumed that the trial judge was satisfied that there was sufficient independent evidence (see Geaney, 417 F.2d at 1120), if the trial judge here failed to make that determination because he did not think it was required under the new Federal Rules of Evidence, he committed error.

defendant's participation in the conspiracy included evidence tending to establish defendant's linkage to the conspiracy merely by his alleged association with the conspirators. This evidence, which establishes, essentially, guilt by association,* ought not to be accorded any probative weight. As this Court stated in Fantuzzi:

"We are constrained to hold that the Government has proved little more than association between Bruno and the conspirators. As was stated in United States v. Ragland, 375 F.2d 471, 477 (2d Cir. 1967), cert. denied, 390 U.S. 925, 88 S.Ct. 860, 19 L.Ed.2d 987 (1968), 'It is true that an association with an alleged conspirator, without more, is insufficient to establish the necessary foundation for the admissibility of the incriminating statements . . . [citations omitted] . . .'. The accused must 'in some sort associate himself with the venture, . . . participate in it as in something that he wishes to bring about . . . [or] seek by his action to make it succeed.'" United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

See United States v. Steinberg, 525 F.2d 1126, 1134 (2d Cir. 1975), cert. denied, 419 U.S. 971 (1976); United States v. Tramunti, 500 F.2d 1334, 1348 (2d Cir. 1974), cert. denied, 423 U.S. 832 (1975); United States v. Cirillo, 499 F.2d 872, 883 (2d Cir. 1974).

* In United States v. Kenney, 462 F.2d 1205, 1218 (3d Cir.), cert. denied, sub nom Sternkopf v. United States, 409 U.S. 914 (1972), the court noted the "dangers of unfair guilt by association involved in the law of criminal conspiracy"

In contrast to the case at bar, courts which have allowed the admission of co-conspirator statements have required much firmer independent evidence, going to defendant's participation in the conspiracy itself. For instance, in Thogmartin v. United States, 313 F.2d 589 (8th Cir. 1963) (Blackmun, J.), the defendant was prosecuted for conspiracy to transport and transporting stolen securities in interstate commerce. The Eighth Circuit stated that the Government's case contained sufficient independent proof aside from the challenged testimony, including direct testimony of defendant's receipt of the securities from a co-conspirator. Similarly, in United States v. Payden, 536 F.2d 541, 543-544 (2d Cir.), cert. denied, 97 S.Ct. 323 (1976), where defendant was convicted, inter alia, of conspiring to distribute and possess cocaine, the Second Circuit, in holding that ample non-hearsay evidence existed against defendant, pointed to the testimony of a Government undercover agent that defendant had himself made reference to "doing a deal" with his co-defendant.

In both Thogmartin and Payden there was direct, independent evidence, linking the defendant to the charged conspiracy. In sharp contrast, here there was no such clear and direct testimony which connected Duke to the specific conspiracy alleged in the indictment. Thus, it is submitted that, in the instant case, the trial court did not have reasonable grounds to find defendant Duke participated in the specific conspiracy alleged. While there may be evidence that Duke

possessed certain shares of the Potomac Electric Company, only evidence of his guilt by association tended even to suggest he was a participant in the alleged conspiracy. That evidence is not enough.

B. THE ERROR OF VARIANCE, AFFECTING DEFENDANT DUKE'S SUBSTANTIAL RIGHTS, WAS COMMITTED WHEN DEFENDANT WAS CONVICTED ON THE THEORY THAT HE PARTICIPATED WITH ALL DEFENDANTS AND UNINDICTED CO-CONSPIRATORS IN A SINGLE CONSPIRACY, ALTHOUGH THE EVIDENCE DISCLOSED THAT IF DUKE WAS INVOLVED AT ALL THERE WERE MULTIPLE CONSPIRACIES.

In United States v. Bertolotti, 529 F.2d 149, 154 (2d Cir. 1975) this Court stated:

"When convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed. Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). See Note, Federal Treatment of Multiple Conspiracies, 57 Colum.L.Rev. 387, 396 (1957)."

And, in United States v. Calabro, 467 F.2d 973, 1983 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973), the Court stated: "The test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights (citations omitted)."

In the instant case, assuming, arguendo, that the evidence adduced at trial connected defendant Duke to some conspiracy with respect to stolen securities, there was a variance between the single conspiracy alleged and the multiple

conspiracies proved. While the proof adduced at trial demonstrated a conspiracy involving Barbine, Crosby, Ted Adams, Pruitt Williams, Fred Pettaway, and direct evidence linking them with defendants Albert Williams and Donald Niang, even if the declarations of the co-conspirators were admissible against Duke -- which they were not -- Duke was not a member of the single, overall conspiracy which the indictment charged and which formed the basis of the Government's case.

In the kind of chain conspiracy alleged here, the issue with respect to a defendant in Duke's position is this: Does it make any difference to him how his supplier obtained the stolen stock so that a jury may reasonably conclude that in taking the stock from his supplier he intended to join a conspiracy which included people whom he did not know, located in a different state, and who committed acts unknown to him. As this Court said in United States v. Miley, 513 F.2d 1191, 1206 (2d Cir.), cert. denied, 423 U.S. 842 (1975), quoting United States v. Borelli, 336 F.2d 376, 383 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965), there is a flaw in the "chain" conspiracy metaphor:

"this simple picture tends to obscure that the links at either end are likely to consist of a number of persons who may have no reason to know that others are performing a role similar to theirs -- in other words the extreme links of a chain conspiracy may have elements of the spoke conspiracy."

Because of this lack of "reason to know" by persons such as Duke, "at either end" of an alleged chain conspiracy,

in recent cases this Court has looked to whether all the defendants were members of a single organization or were conducting a regular business on a steady basis (see United States v. Bertolotti, 529 F.2d 149, 155 (2d Cir. 1975)); only when they were, has the Court found the necessary nexus among the defendants to allow convictions under the theory of a single conspiracy.

United States v. Moten, Nos. 1206-07, 1212-20, 1230-31, slip op. at 5769 (2d Cir., Sept. 6, 1977), this Court's most recent statement on the subject, provides a good example. There the Court isolated pertinent factors, common to large drug operations, that suggested that nexus necessary to the existence of a single conspiracy: (1) importers or suppliers selling on a regular basis to a core of well financed middlemen, who sell through distributors to the small pusher; (2) the knowledge of the participants, derived from the large quantity of drugs involved, that the chain is extensive; (3) continuing relationships that are neither casual nor spasmodic, where no defendant is involved in simply a single sale.

The fact pattern developed in Moten is totally different from the small-time, non-repeating sale of securities which was the subject of the trial here. Examination of the record indicates that it was an amateur operation, which arose only out of the happenstance that Barbine's future brother-in-law worked in the mailroom of a bank. So far as the record reveals, many of the alleged co-conspirators never knew each

other, and never worked together before or since in any enterprise, whether criminal or legitimate. No connection whatsoever was shown between Duke and the Ohio group, and there was no reason for him to be interested in their activities.

Far from the structured situation in Moten, which this Court pointed to in order to establish some interest in one another's activities among all the participants in the chain of distribution, the fact pattern here is closest to that described in Judge Learned Hand's decision in United States v. Peoni, 100 F.2d 4 (2d Cir. 1938). There, defendant sold counterfeit bills to a second party, who, in turn, sold the same bills to a third person, who was arrested while trying to pass them. This Court reversed the conspiracy conviction of the first defendant in the chain because he was not a party to a conspiracy by which the third person possessed the bills. Judge Hand pointed out that defendant had no concern with the bills after the second party paid for them. The fact pattern in the instant case is virtually identical, except that Duke is alleged to be at the opposite end of the chain. Duke, assuming involvement with stolen securities, had no interest in how the alleged co-conspirators acquired them.

The majority and concurring opinions in United States v. La Vecchia, 513 F.2d 1210 (2d Cir. 1975) are also instructive. That case involved a conspiracy to distribute counterfeit money. The entire Panel agreed that there was

a counterfeiting ring; the only difference between the opinions centered around the involvement of one defendant, Kurshenoff. The Court pointed out that, "to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred." Id. at 1218. The majority, holding Kurshenoff to be a co-conspirator who had "some knowledge" of the broader conspiracy, was able to point to his large and direct purchases of notes from conspirator Russo, a very large distributor of counterfeit notes who testified at the trial for the Government, and to the fact that because Kurshenoff was immediately called by Russo on a second occasion, the jury could have concluded that he "had become a regular participant in the distribution" and must have known that others were supplying Russo. 513 F.2d at 1219. This evidence was insufficient for Judge Mulligan. He stated in his concurring opinion that there was a separate conspiracy between Kurshenoff and Russo because the items to which the majority pointed were insufficient to allow the jury to infer that, "there were sufficient facts to alert Kurshenoff that others were supplying Russo." Id. at 1220. Distinguishing between distribution of narcotics and counterfeit money, Judge Mulligan held that counterfeiting can be done on a small scale and involve-

ment does not necessarily indicate "an organization assuring a steady supply" (513 F.2d at 1221).*

The case at bar is a paradigm of Judge Mulligan's distinction. As in Peoni, there were no facts produced at the trial that indicated Duke had any interest in who was supplying his supplier -- people well removed from him geographically and temporally. And, indisputably, no "organization" even existed in this case. This operation could hardly have been done on a smaller scale. It was a rag-tail group of blundering amateurs engaged in a small-time operation, who began by taking the wrong type of certificates and who were carping at each other because of their inability to dispose of the stolen securities over a period of several weeks after the last theft.

Defendant Duke's involvement in the instant case, then, does not even come up to the involvement of Kurshenoff in La Vecchia; it more closely resembles the fact patterns discussed in United States v. Miley, 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975) and United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975), in both of which even larger-scale and more repetitive enterprises were held to constitute multiple, rather than single, conspiracies.

* Significantly, in Moten the Court distinguished Judge Mulligan's concurring opinion in La Vecchia on the ground that La Vecchia did not involve illegal drug trafficking; slip op. at 5779 n.7. Of course, this case involves securities, not narcotics.

In Miley this Court held that there was insufficient evidence to establish a single narcotics conspiracy where the so-called central operation could not even be called a "loose-knit" one which would, at least, suggest a scale of activity that would indicate to participants the necessary involvement of other conspirators. Similarly, in Bertolotti, this Court held that, notwithstanding evidence which demonstrated that each of the asserted transactions took place, no evidence linked them to a single conspiracy.* In so holding, the Court emphasized that there was no proof that illicit business was being conducted on a regular basis.**

It is submitted that the Government's evidence, if it is believed, failed to establish the single conspiracy set forth in count one of the indictment; only the existence of two or more distinct conspiracies may be inferred from the proof. Therefore, the error of variance has been committed. See Berger v. United States, 295 U.S. 78 (1935); Kotteakos v. United States, 328 U.S. 750 (1946).

* * *

This variance between the indictment and the Government's proof worked substantial prejudice on Duke. As indi-

* See United States v. Butler, 494 F.2d 1246, 1255 (10th Cir. 1974).

** See United States v. Hinton, 543 F.2d 1002, 1014 (2d Cir. 1976), cert. denied, 97 S.Ct. 493 (1976) (Bertolotti distinguished because evidence established that alleged members of the conspiracy worked together on a continuing basis).

cated above, the Government's independent evidence of Duke's involvement in a conspiracy with Albert Williams, Niang, Barbine, Crosby and other unindicted co-conspirators was meager and equivocal, resting, as it did, on the disfavored guilt by association argument. Therefore, absent competent and independent proof of Duke's illicit connection with co-defendants and other unindicted co-conspirators (i.e., the single conspiracy set forth in the indictment), rather than some other possible conspiracy involving Duke, the admission into evidence of the extra-judicial statements of alleged co-conspirators, not connected to Duke by the evidence, was highly prejudicial.

Furthermore, the guilty verdicts were impermissibly supported by the plethora of testimony about details of the Barbine-Crosby-Adams conspiracy. The prejudice engendered by this testimony should be apparent considering the weak, and insubstantial, case presented against Duke. Without all that extraneous testimony, the jury might well have believed Duke's alibi witnesses and concluded that the FBI agents erred in their identification. As it was, Duke was acquitted on counts four and five of the indictments. Accordingly, it is submitted that his conviction on counts one and three resulted from being unfairly exposed to that harmful, but as to him, irrelevant, testimony.

POINT II

THE ADMISSION INTO EVIDENCE OF DUKE'S PRIOR CONVICTION CONSTI- TUTED ERROR REQUIRING REVERSAL ON BOTH COUNTS.

Over the strenuous objections of Duke's counsel below, the Court permitted the Government to introduce a certificate of Duke's conviction for a similar crime. The admission of this conviction was discussed with the Court on two occasions prior to the commencement of the trial (November 29 and 30, 1976). Defense counsel, on November 30, contended that the introduction of the certificate of conviction would blacken the defendant in the minds of the jury. He also maintained that the probative value of the prior conviction was slight. Despite counsel's admonitions, however, the trial judge stated that he did not have any doubt in his mind that the certificate of conviction was admissible.

In an attempt to mitigate the prejudicial effect of the prior conviction, defense counsel suggested the possibility of a stipulation by which Duke would agree that he had knowledge of securities and had worked in a securities firm. The trial judge responded obliquely to this proposal by stating, "Whatever you can work out with the [Assistant United States Attorney] you go ahead and see if you can do it."

Apparently, nothing was worked out because, after presenting all its witnesses, the Government expressed its intention to enter into the record the certificate of con-

viction showing that defendant Duke previously had been convicted of a similar criminal act (Government Exhibit 31). (Tr. 430-441). Again, Duke's counsel strenuously objected. (Tr. 431-435, 439). He argued that it was not being offered solely to show Duke's knowledge or intentions, and expressed his fear of, what he termed, the "flow-over" effect that would arise from the admission of the exhibit, which might well have the effect of causing the jurors to find defendant guilty based on the conviction and not the evidence. (Tr. 431-435). The trial judge overruled this objection to the certificate of conviction and instructed the jury that it was offered only on the question of intent. (Tr. 439-442).

Rule 803 of the Federal Rules of Evidence which was the sole basis for the trial judge's determination to sustain the admissibility of Duke's prior conviction, in listing items not excluded by the hearsay rule, even though the declarant is available as a witness, provides, in pertinent part, as follows:

(22) Judgment of previous conviction. Evidence of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

However, Rule 803 does not mandate the admission of the previous conviction; it merely precludes a hearsay objection when the party offering the previous conviction establishes that it determined an issue relevant to the second litigation. 4 Weinstein, Evidence ¶ 803(22)[01] at p. 803-230.

Duke's previous conviction, however, proved no fact relevant to the judgment of conviction here. The trial judge stated that he was allowing the prior conviction to show Duke's intent, and he so instructed the jury. (Tr. 686-687). But the prior judgment of conviction showed only Duke's intent to sell the stolen securities involved in that case; it had no bearing whatsoever on whether Duke intended to transport or sell, or to conspire to transport or sell, the securities involved in this case. Admission of the prior conviction was a grievous error; its admission could be used solely for the proscribed purpose of showing Duke's proclivity to commit this kind of criminal act.

The admission of a prior conviction, especially for an almost identical criminal act, is always prejudicial, but it was all the more so here because it had the necessary effect of undermining Duke's entire defense. Duke's defense was that the FBI had identified the wrong person, and he supported it with four alibi witnesses. But the jury was much less likely to accept Duke's defense of mistaken identity in the face of a prior conviction for an almost identical act.

Even if the prior conviction were not hearsay -- and thus prima facie admissible -- the trial judge erred by failing to consider exercising his discretionary power to exclude it under Rule 403 of the Federal Rules of Evidence,* despite the offer of Duke's counsel to stipulate to facts which could have avoided the prejudice inherent in the admission of the prior conviction. The trial judge's ruling on admissibility, limited solely to consideration of one provision of the Rules, and his failure to balance the "danger of unfair prejudice" against the "probative value" of the previous conviction, and to fully articulate the reasons for his determination on that issue, in the face of a strenuous objection based on prejudice, amounts to a prejudicial, and reversible, abuse of discretion.** As recently stated in United States v. Dwyer, 539 F.2d 924, 927 (2d Cir. 1976), in which this Court reversed a conviction for abuse of discretion when the trial court failed to articulate his basis for excluding evidence under Rule 403:

* That Rule provides as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

** Cf. United States v. Smith, 551 F.2d 348, 357 (D.C. Cir. 1976) (Case remanded to the District Court, which failed to apply Rule 609 of the Federal Rules of Evidence, for a determination of whether the probative value of defendant's prior conviction outweighed its prejudicial effect).

"The spirit of Rule 403 would have been better served had the judge "confront[ed] the problem explicitly, acknowledging and weighing both the prejudice and probative worth" of the proffered testimony. United States v. Robinson, 174 U.S. App. D.C. 224, 229, 530 F.2d 1076, 1081 (1976). See also 1 Weinstein's Evidence ¶ 403[02] at 403-14 to 403-15 (1975); 1 Wigmore, Evidence § 29 at 414 (3d ed. 1940)."

United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975) provides an instructive example of how a trial court should properly exercise its legitimate discretion under Rule 403. Judge Weinstein determined that evidence of defendant's arrest in Georgia, unrelated to the robbery charges on trial, had probative value in establishing defendant's presence in Georgia, and, consequently, his flight resulting from consciousness of guilt shortly after the robbery, but that admission of testimony concerning the arrest also posed the possibility of unfair prejudice. He therefore held that, "the evidence relating to defendant's arrest in Georgia will be inadmissible at trial, provided that the defendant enter into a stipulation to the effect that he was in Georgia shortly after the robbery and that while there he used a false name." United States v. Jackson, 405 F. Supp. at 945. Commenting on its own "conditional ruling," the court noted:

"a conditional ruling of this sort is justified by Rule 102 of the Federal Rules of Evidence. Rule 403, read in light of Rule 102, contemplates a flexible scheme of discretionary judgments by trial courts designed to minimize the evidentiary costs of protecting the parties from unfair prejudice. Conditioning exclusion of proof of

the arrest upon the entry of a stipulation is a practical solution to that problem here." (United States v. Jackson, supra).

Here, defense counsel made an offer that defendant would stipulate to his significant knowledge of securities, which followed the rationale of the stipulation required by Judge Weinstein. Moreover, the conviction was largely cumulative to the testimony of the FBI agents on the issue of intent. And while the trial judge charged the jury that the conviction was probative on the issue of whether "defendant acted willfully and with specific intent and not because of mistake or accident or other innocent reason" (Tr. 687), there was no "real necessity" which required the Government to offer it because Duke never asserted that "the act charged was done innocently or by accident or mistake." United States v. Byrd, 352 F.2d 570, 575 (2d Cir. 1965). In such circumstances, the trial judge should have excluded it. Id.

Accordingly, the trial court's admission of Duke's prior conviction, while failing to constructively minimize potential prejudice, constituted an abuse of discretion warranting a reversal of the adverse judgments below.* This error was

* This Court's recent decision in United States v. Robinson, No. 1184, slip op. at 5034 (2d Cir., Dec. July 28, 1977) (en banc), stated that, "the preferable rule is to uphold the trial judge's exercise of discretion unless he acts arbitrarily or irrationally." But that standard presumes that, as this Court's opinion in Robinson itself makes evident, the trial judge actually weighed, and carefully balanced, the probative value of the proffered evidence against

[Footnote continued on following page]

particularly prejudicial in view of the weak case presented against Duke, discussed at length in Point I, supra, and the inevitable tendency of Duke's prior conviction to lead the jury unfairly to discount the testimony of his four alibi witnesses. Cf. United States v. Warren, 550 F.2d 219, 228-229 (5th Cir. 1977); United States v. Splain, 545 F.2d 1131, 1135 (8th Cir. 1976).

POINT III

REVERSAL ON THE CONSPIRACY COUNT
REQUIRES REVERSAL ON THE SUB-
STANTIVE COUNT BECAUSE THE "SPILL-
OVER EFFECT" SUBSTANTIALLY PREJU-
DICED DUKE.

Duke's conviction under count three of the indictment was substantially affected by the extensive evidence allowed on the conspiracy count, including a full explication of the theft of the securities and the entire story of Barbine's attempts to sell them. Should the conspiracy conviction be reversed, then, Duke is entitled to an entirely new trial at which he can present his simple, yet strong, alibi defense against the only substantive count under which he was convicted. As noted above, the jury would likely have viewed Duke's alibi witnesses quite differently if it had been presented solely

its tendency to create unfair prejudice. See, e.g. United States v. Ravich, 421 F.2d 1196 (2d Cir.), cert. denied, 400 U.S. 834 (1970), quoted in United States v. Robinson, supra, at 5032. Here the trial judge failed to undertake in earnest precisely that kind of careful balancing that underlies this Court's rule.

with the alibi witness' story and the FBI agents' identification.

The law on this point in this Circuit is clear:

"Appellants can only succeed in this argument if they can show bad faith on the part of the Government in bringing the conspiracy charge, or if they show prejudice. United States v. Aiken, 373 F.2d 294 (2d Cir. 1967). See also, United States v. Bentvena, 319 F.2d 916 (2d Cir.), cert. denied, 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1963); United States v. Branker, 395 F.2d 881 (2d Cir. 1968), cert. denied, 393 U.S. 1029, 89 S.Ct. 639, 21 L.Ed.2d 573 (1969); United States v. Miley, 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 62 (1975); and United States v. Ong, 541 F.2d 331 (2d Cir. 1976)." United States v. Variano, 550 F.2d 1330, 1334 (2d Cir. 1977).

Prejudice in this case is manifest. In United States v. Branker, 395 F.2d 881 (2d Cir. 1968), cert. denied, 393 U.S. 1029 (1969), the Court found prejudice as to three of eight defendants, who were indicted in only a few of the counts, and whose names appeared in only a small part of the record. The prejudice here is much greater because in Branker the trial court had dismissed the conspiracy count at the close of the Government's case, while here the conspiracy count, and all the evidence connected to it, actually went to the jury. As this Court stated in United States v. Bentvena, 319 F.2d 916, 955 (2d Cir. 1963), in ordering a new trial in such a situation:

"All counts were submitted to the jury, which found defendants guilty of conspiracy on evidence that we have unanimously held to be legally insufficient, and then considered the mass of hearsay declarations of purported co-conspira-

tors against them. There appears to us far greater likelihood of prejudice here than in a case where the jury has weighed the evidence of conspiracy and found it wanting, or where the Court has so found and warned the jury to disregard it."

Here, the testimony with respect to Duke and the alleged conspiracy, with the declarations of co-conspirators excepted, amounted to a small part of the record. Yet the voluminous testimony about the conspiratorial web and the improperly admitted declarations of co-conspirators unfairly ensnared him. Duke is entitled to a new trial limited to the substantive count, which the Government should have accorded him in the first place. Only then can his alibi defense be tested on the merits, without the prejudice of such extraneous evidence.

CONCLUSION

The judgment of conviction on the conspiracy count should be reversed for the reasons set forth in Point I. Should the Court grant that relief, the judgment convicting him on count three should also be reversed, and a new trial granted on that count, for the reasons set forth in Point III.

And for the reasons set forth in Point II, the judgment convicting Duke on counts one and three should be reversed and the case remanded for a new trial.

Dated: New York, New York
September 30, 1977

Respectfully submitted,

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Of Counsel:

Jay Wishingrad

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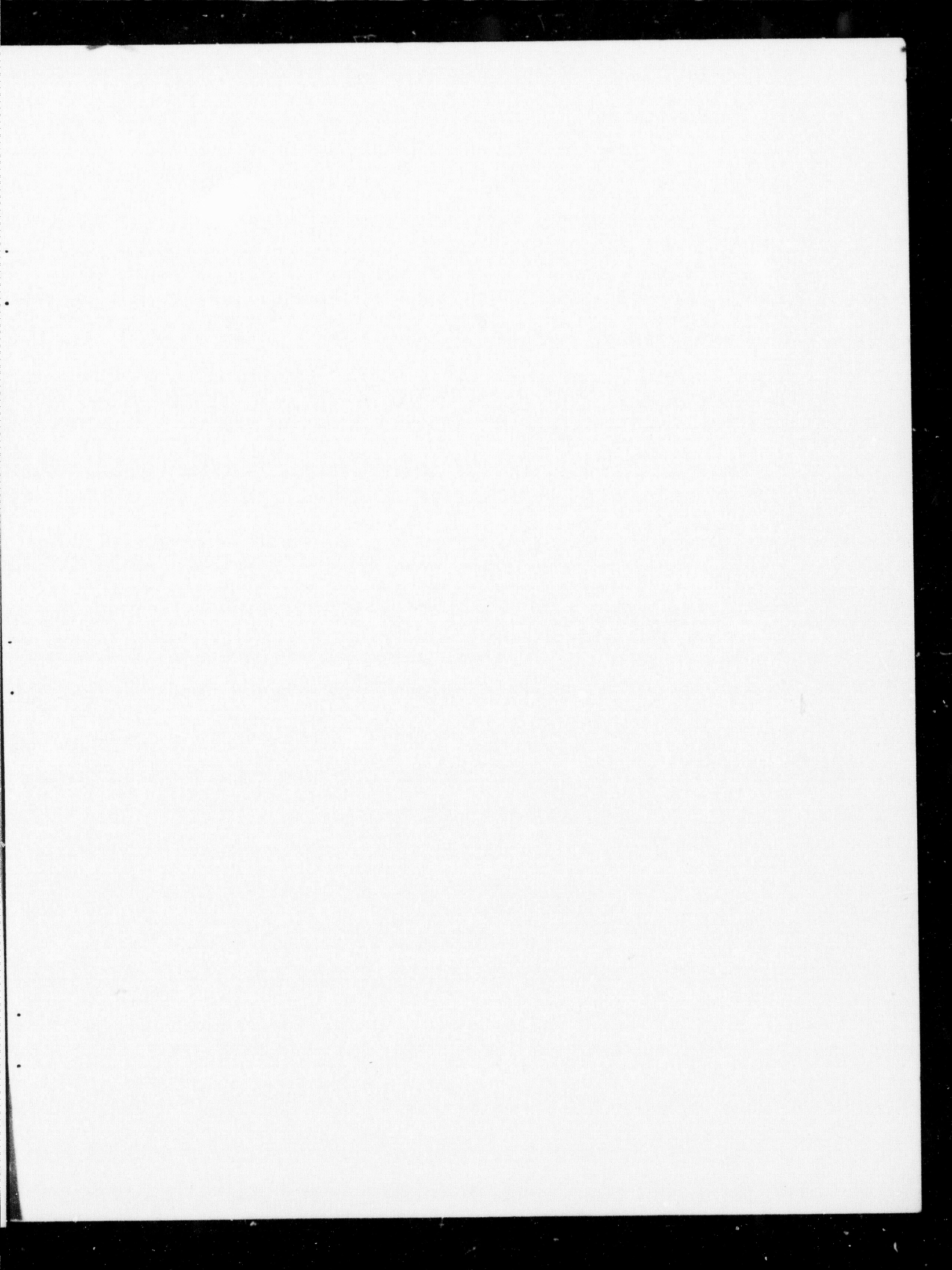
U.S. Attorney's Office

4⁵⁵ P.M. 9/30/77

M. Rottenberg

for Chief Appellate atty.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,	:	
	:	Docket Nos. 77-1283
Plaintiff-Appellee,	:	77-1289
	:	77-1365
v.	:	
ALBERT DUKE, DONALD NIANG &	:	AFFIDAVIT OF SERVICE
ALBERT WILLIAMS,	:	
	:	
Defendants-Appellants.	:	

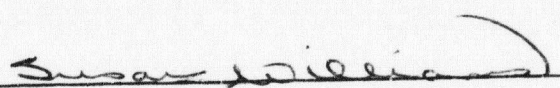
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STATE OF NEW YORK	)	
	:	ss.:
COUNTY OF NEW YORK	)	

SUSAN WILLIAMS, being duly sworn, deposes and says that she is employed by the law firm of Kaye, Scholer, Fierman, Hays & Handler, is over the age of eighteen years and not a party to this action.

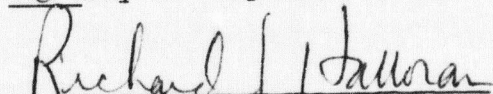
On September 30, 1977, deponent served a true copy of the Brief of Defendant-Appellant Albert Duke by depositing same enclosed in a sealed postpaid envelope in the post office box regularly maintained by the U.S. Postal Service at 425 Park Avenue, New York, New York, addressed to the following:

Kenneth W. Salaway, Esq.
125-10 Queens Blvd.
Kew Gardens, New York 11415



Susan Williams

Sworn to before me this
30 day of September, 1977


Notary Public

RICHARD J. HALLORAN
Notary Public, State of New York
No. 60-4618583
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1979



STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.
☐ Attorney's Affirmation shows: deponent is

Check Applicable Box

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

☐ Individual Verification the being duly sworn, deposes and says: deponent is in the within action; deponent has read and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.
☐ Corporate Verification the of corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.
☐ Affidavit of Personal Service On 19 at upon the person so served to be the person mentioned and described in said papers as the personally. Deponent knew the therein.

Sworn to before me on

19

The name signed must be printed beneath

Index No.

Year 19

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